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# Customs Legislation Amendment Bill (No. 2) 2003

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# Customs Legislation Amendment Bill (No. 2) 2003

Rosemary Bell and Sudip Sen
Law and Bills Digest Group
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# Customs Legislation Amendment Bill (No. 2) 2003

**Date Introduced:** 15 May 2003

**House:** Representatives

**Portfolio:** Justice and Customs

**Commencement:** The formal provisions of the Bill commence on Royal Assent. Other provisions have various commencement dates which will be described in the Main Provisions section of this Digest.

## Purpose

The Bill amends the *Customs Act 1901* to:

- amend certain reporting requirements
- update electronic communication provisions, and
- update offence provisions where false or misleading statements are made.

The Bill also:

- corrects a technical error in the *Customs Legislation Amendment Act (No. 1) 2002*, which if left uncorrected, would mean that an amendment will never commence, and
- amends the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* to reinstate a right to seek a review of certain decisions by the Administrative Appeals Tribunal; and to repeal and replace the transitional arrangements that will apply in respect of exports once the new Customs Integrated Cargo System commences.

## Background

Six years ago the Australian Customs Service (Customs) decided that it needed to replace its core information infrastructure.[1] The aim of the Cargo Management Re-engineering (CMR) project is to create an integrated system to replace the several computer platforms (the 'legacy systems') that handle exchanges of complex and varied documentation involved in routine imports and exports.[2] The Minister for Justice and Customs, Senator

the Hon. Chris Ellison, is reported as describing the CMR project as the biggest overhaul of import and export processes since Federation.[3] The integrated system has to satisfy the legislative requirements of Customs while providing traders with a broader range of electronic reporting options, and facilitating the identification of high-risk goods.[4]

In 2001 Parliament passed a package of legislative measures, the purpose of which is to modernise the way in which Customs manages the movement of cargo into and out of Australia.[5] Chief among this legislation is the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (ITM Act) which amends the *Customs Act 1901* to introduce new compliance measures for reporting and accounting for cargo movements. The provisions of the ITM Act are to commence on 21 July 2004 unless proclaimed to commence before that date.[6] The effect of the ITM Act is to set a deadline of July 2004 for the implementation of Customs' new system.

The CMR project is being implemented in three stages. The first stage connects the new computer system, the Integrated Cargo System (ICS) which handles risk assessment and reporting of imported and exported cargo, to the small number of express carriers, such as DHL. This stage serves as a pilot to test some electronic reporting functions because of the large volumes of cargo and the limited number of express carriers.[7] The first stage was implemented successfully in April 2003.[8]

The second stage is to implement the ICS export functions across the industry. Release of the ICS export software was to be completed by 1 December 2003. However, because industry testing of the components was delayed from May until August 2003,[9] Customs will not cut over from its existing export system, known as EXIT, until March 2004.

The final stage of the CMR project is the implementation of ICS import functions. According to press reports, both industry and Customs agree that the import cargo declaration software is the most complex piece of the new system.[10] This may be because there are many more categories of imports, they come from more sources than our exports, and there will be more users of the import software. At present, release of the ICS import software is due to be completed in June 2004.[11]

More than 5000 importers, exporters and other traders will use the new CMR software.[12] The size of the companies involved ranges from multinationals to small traders that often rely on external service providers for their computing needs. All of them will need to implement and test the CMR software before the legislative deadline of 21 July 2004.

Currently importers and exporters may communicate with Customs either electronically or by submitting paper documents. When the amendments made by the ITM Act commence, all traders will have to use electronic systems to communicate with Customs. It is anticipated that some importers and exporters will not have the relevant computer software or hardware to communicate directly with Customs and that those people will use agents, such as computer service bureaus to communicate with Customs on their behalf.[13] Part 4 of this Bill amends the *Customs Act 1901* to reflect the changes in procedures that will arise when the new communications systems commence by mid 2004. In particular, Part 4

amends offence provisions where false or misleading statements are made in order to capture all people who may be potentially liable for making a false or misleading statement to Customs.

Some changes to the ITM Act have also become necessary as the date for implementation of the new computer system comes closer. Customs originally intended the cut over between the 'legacy systems' and the ICS as a clean break and the saving provisions in the ITM Act were written to reflect this planning. However, following consultation with industry, Customs has decided to phase in the transition between the old systems and the new by allowing a period of up to 30 days in which both systems may be used. Part 7 of this Bill amends the ITM Act to provide new transitional arrangements for reporting on exports. The Minister forshadowed in his second reading speech that similar amendments relating to import transactions are intended to be introduced into Parliament before Customs starts to implement the imports phase of the ICS.[14]

## Main Provisions

**Parts 1-4 of Schedule 1** amend the *Customs Act 1901*.

### Part 1 – Timing and content of outturn reports

An 'outturn' report is communicated by stevedores to Customs and provides Customs with the ability to monitor cargo being unloaded from a vessel at a wharf.[15] **Item 1** replaces subsection 64ABAB(2) of the Customs Act with **new subsections 64ABAB(2)-(2F)**. This Part fixes an unintended consequence of the Customs Act which resulted in a requirement that outturn reports should be provided to Customs every 3 hours from the commencement of unloading until the last container had been unloaded. Technically, it appears that this would have been required even when there was no activity on the wharf.

The amendments put in place arrangements which limit the reporting requirements to the activities of unloading containers, that is, reporting for periods during which containers are unloaded.

**Commencement**: Immediately after the commencement of item 118 of Schedule 3 to the Customs Act. According to the *Explanatory Memorandum*, item 118 can only commence when Customs has developed the new electronic systems for communicating outturn reports. It is anticipated that item 118 will be proclaimed to commence in mid 2004, but no later than 20 July 2004.[16]

## Part 2 – Notice of removal of export goods

Subsection 114F(1B) of the Customs Act requires a person to report to Customs the removal of goods from a wharf or airport, other than if they are being removed for the purpose of being loaded onto a ship or aircraft for export. At present the report must be made within a prescribed time after the goods have been removed. **Item 3** replaces subsection 114F(1B) and provides that the removal of relevant goods must be reported to Customs electronically before they are removed. Regulations may require that removal notice is given to Customs by a specified time before removal.

**Commencement**: Immediately after item 62 of Schedule 3 to the ITM Act. Item 62 has not yet commenced. According to the *Explanatory Memorandum* it is anticipated that item 62 will be proclaimed to commence in late 2003, and not later than 20 July 2004 if no proclamation is made. [17]

## Part 3 – Electronic communications

### Division 1 - Communications relating to exports

Subsection 114(4) of the Customs Act required that an electronic export declaration be communicated only by the owner of the goods. **Item 4** replaces **subsection 114(4)** removing the requirement that the owner communicate the declaration but retaining the requirement that the electronic export declaration communicate such information as set out in an approved statement. The *Explanatory Memorandum* explains that other persons, such as brokers and freight forwarders, can and do act for the owners to discharge their obligations to communicate with Customs.[18]

**Item 6** inserts **new sections 126DB - 126DD.** In enacting the ITM Act which amended the Customs Act, provisions with regard to the attribution and non-repudiation of statements were also repealed. **New sections 126DB** to **126DD** replace these provisions with generic provisions to allow for the greater range of communications introduced by the ITM Act and future changes in the range of communications and use of technology.

Section 15 of the *Electronic Transactions Act 1999* provides in general terms that the originator of an electronic communication would only be bound by the communication if they sent it or gave their authority to send it. This provision does not apply in the case of the Customs Act. Similar to existing sections 67D, 77B and 122B, **new section 126DB** provides that an electronic communication required or permitted by the Act is taken to be made even if the person does not authorise the communication in certain circumstances. The onus remains on the communicator if the communication meets the information technology signature requirements determined by the Customs CEO and the person did not notify a breach of those requirements before the communication.[19] The provision for the communicator to provide evidence to the contrary remains.

Comment: Whilst this would seem to give the CEO of Customs an increased capacity to determine the methods of verification that are acceptable, it would appear cumbersome to insist on the degree of detail evident in the primary legislation as it stands. Given the context of the scheme, the certainty of method should be balanced against the practical realities of the amount of detail in primary legislation. As a matter of practical workability if nothing else, consultation with the affected parties would always be required before new methods are prescribed.

**New section 126DC** replaces existing section 241 of the Customs Act. The provision requires Customs to keep records of all communications required or permitted under the Customs Act for 5 years. It will cover both communications made to Customs, such as import and export declarations, as well as communications such as authorities to deal and movement permissions that are made by Customs. **New section 126DC** also provides that in proceedings under the Customs Act, such records are admissible prima facie evidence that the person made the statements in the communication.

**Commencement**: This Part commences immediately after the commencement of item 1 of Schedule 3 to the ITM Act. Item 1 has not commenced yet. According to the *Explanatory Memorandum* it is anticipated that item 1 will be proclaimed to commence in late 2003, and not later than 20 July 2004 if no proclamation is made. [20]

### Division 2 – Communications relating to imports

Section 71F of the Customs Act provides that at any time after an import entry is communicated to Customs, and before the goods to which it relates are dealt with in accordance with the entry, a withdrawal of the entry may be communicated to Customs. Existing subsection 71F(4) of the ITM Act requires that only the owner of the goods may communicate an electronic withdrawal of an import entry. For reasons similar to those outlined by item 4 above, **item 7** repeals subsection 71F(4) of the ITM Act, allowing brokers and other agents to act on behalf of the owner of the goods and to communicate electronically with Customs.

**Commencement**: This Part commences immediately after the commencement of item 38 of Schedule 3 to the ITM Act. Item 38 has not commenced yet but will commence on 20 July 2004 unless proclaimed to commence before that date. According to the *Explanatory Memorandum* it is anticipated that item 38 and new section 71F will be proclaimed to commence in mid 2004.[21]

## Part 4 – False and Misleading Statements

The *Explanatory Memorandum* notes that the existing provisions making persons liable for making false or misleading statements will be inadequate once the new electronic communications systems are introduced.[22] These new communications systems appear to introduce, of necessity, more indirect paths of communication, for example, the owners of goods using a broker who in turn engages a bureau to communicate. The amendments in

this Part are intended to extend the current scheme to cover the possibilities under the new system.

**Item 9** revises **subparagraph 234(1)(d)(i)** of the Customs Act so as to cover those who recklessly or misleadingly cause certain statements to be made that would give rise to an offence. Under the new communication systems, this would, for example, cover a broker instructing a bureau to make a declaration that goods have been undervalued. In other words, although the broker does not, literally, make the statement, he/she would still be covered by the offence.

**Item 11** revises **subparagraph 234(1)(d)(ii)** to do the same thing for the offence of omitting a material particular in a declaration.

To avoid doubt, **item 12** adds the new offences of intentionally giving information that is false or misleading (**new subparagraph 234(1)(d)(iii)**), or omitting a material particular (**new subparagraph 234(1)(d)(iv)**), in the knowledge that the information will be included in a statement to Customs. This would, for example, cover the situation of an owner providing a false invoice to their broker.[23]

The same penalties will apply to all offences in paragraph 234(1)(d). This reflects the view that the offences of giving false or misleading information for inclusion in a statement to Customs is as serious as those of making the false or misleading statement directly to Customs and should be subject to the same penalties.

**Part 4** also deals with the obligations of those who communicate with Customs to retain records that verify the contents of their communication. **Item 13** revises **subsection 240AB(1)** to ensure that people who pass information to other people for inclusion in communications to Customs are also required to retain records for a period of 12 months.

**Item 16** adds **new subsection 240AB(3A)** which lists the types of records that must be kept for a year. In short, the records to be kept are those that verify the information, or if received from someone else, the details of that receipt, and if given to someone else, the details of that giving. Details include the fact of the event and the identity of the giver / recipient. The maximum penalty for non compliance is 30 penalty units (that is, $3300). **Item 17** proposes **new subsection 240AB(8)** which notes that the obligations in **item 16** are additional to existing obligations under current section 240 that requires owners and certain persons who deal with such goods to keep commercial documents relating to the goods for 5 years.

**Item 19** replaces existing subparagraphs 243T(1)(b)(ii) and (iii) with **new subparagraph 243T(1)(b)(ii)**. Currently, a person only commits an offence of making false and misleading statements (or omissions) in respect of goods when it results in an actual overpayment of duty to an owner (whether by Customs refund or drawback application). The offence does not cover the situation where Customs discovers such a false or misleading statement or omission before such a payment is made. The new subparagraph would make an *attempt* to claim an overpayment an offence as well.

**Item 22** replaces **subsection 243T(4)** to ensure that error notices, which provide a defence to a failure to report an error, are given pre-emptively (voluntarily), rather than following a request for information from Customs. Similarly, pre-emptive payments of the shortfall of duties, refunds or drawbacks would be required to be paid before infringement notices were issued or proceedings are commenced. Currently the owner can give an error notice to Customs up until the time that Customs issues a notice stating that they are going to be audited under the monitoring power provisions. When an error notice is given after the audit notice is issued, the owner does not receive the benefit of the defence in subsection 243T(4). According to the *Explanatory Memorandum*, in the majority of circumstances covered by section 243T, the owner will owe Customs duty. The purpose of the proposed amendment in **item 22** is to ensure that the owner pays the duty owing to Customs in order for the defence in subsection 243(T) to apply (**new paragraph 243T(4)(c)** refers). This amendment will save Customs having to pursue the owner to recover the duty.

The rationale for this change appears to be the saving of 'administrative difficulties'. According to the *Explanatory Memorandum* 'significant administrative difficulties would arise if a person could take action removing their liability for an offence **after** an infringement notice is served or **after** proceedings commenced'.[24]

**Items 23 and 24** are intended to preserve the operation of existing section 243U which provides that those who make a false or misleading statement that does not actually result in a shortfall of duties, refund or drawbacks would nevertheless commit an offence. The items ensure **subparagraphs 243U(1)(a)(i) and 243U(1)(a)(ii)** cover owners and brokers (as well as bureaus) , if they 'cause' information, or 'cause' omissions, that lead to false or misleading statements to Customs under the new subsections in **item 27**.

**Item 27** inserts **new subsections 243U(3A) and 243U(3B).** These subsections will set out when certain persons will be taken to have caused a statement to be made, or to have caused a relevant omission respectively. For example, if an owner provides a false invoice to his or her broker and the broker or their bureau includes that information in a communication to customs, the owner will be taken to have caused the false or misleading statement to be made. The elements of the cause of omission are that a person provides false or misleading information for inclusion in a statement (other than a statement in a cargo or outturn report) because of an omission of other information the person has. The section expressly states it is not intended to limit the ways in which a person may cause a statement or omission to be made.

**Item 28** inserts **new subsection 243U(4)** which repeats the amendment in item 22 for false or misleading statements not resulting in a loss of duty (section 243U). **New subsection 243U(4)** will ensure that where an error notice is given before an audit notice is given to the person who made the statement, or caused a statement to be made, the person who omitted a matter or the person who caused a matter to be omitted, will be exempt from committing the offence under section 243U.

**Items 29** and **30** make similar amendments for cargo and outturn reports to those made in items 23 and 24. **Item 31** makes a similar amendment to that in item 22 for cargo and outturn reports.

**Commencement**: 28 days after the Bill receives Royal Assent. The *Explanatory Memorandum* notes that this period is to allow Customs time to inform people of their new obligations and the new offence provisions.[25]

## Part 5 – Technical correction

**Item 33** amends the *Customs Legislation Amendment Act (No. 1) 2002* in order to correct a currently misdescribed amendment. The misdescribed amendment has not yet commenced and, according to the *Explanatory Memorandum*, it is not expected to commence until mid 2004.[26] The technical correction will ensure that the misdirected amendment will be able to come into effect when required.

**Commencement**: Immediately after the commencement of item 118 of Schedule 3 of the ITM Act. This is anticipated to be in mid 2004, or by 20 July 2004 if not proclaimed earlier.

## Part 6 – AAT review of decisions about remitting penalty under old law

**Item 34** amends the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* (ITM Act) to reinstate a right to seek a review of certain decisions by the Administrative Appeals Tribunal. **New item 8 of Schedule 2** of the ITM Act will insert a new saving provision so that applications for review can be made up to 28 days after this Bill receives Royal Assent. The matters that may be reviewed are set out in **new subitem 8(1)** and relate to a decision of the CEO of Customs under section 243U of the Customs Act. Section 243U dealt with a previous administrative penalty scheme which was replaced on 1 July 2002 by a penalty infringement notice scheme.[27]

**Commencement**: Royal Assent

## Part 7 – Transitional arrangements for exports

This Part deals with the period between the commencement of the ITM Act and a time not more than 30 days later (the 'cut-over' time). Under **subitem 37(3)** the CEO of Customs must specify the cut-over time by publishing a notice in the *Commonwealth of Australia Gazette* prior to the commencement of the ITM Act.

**Part 7** repeals and replaces transitional provisions to allow for the phasing in of the new ICS system for exports. **Item 36** repeals item 84 of Schedule 3 of the ITM Act which sets out the existing saving provisions. The new saving provisions allow for a transitional

period of up to 30 days during which the EXIT computer system and the ICS will both operate **(item 38)**. However under the proposed provisions an exporter will not be able to choose which electronic system they use during the transitional period. For goods that are intended to be exported after the cut-over time, the person communicating with Customs must use the ICS. For goods that are intended to be exported prior to the cut-over day, the person communicating electronically must use the EXIT system.

The ITM Act introduces a number of new obligations in respect of goods intended to be exported. During the transitional period these provisions will apply to goods intended to be exported after the cut-over time. People who do not comply with the new obligations during the transitional period will not commit an offence. **Subitem 38(2)** provides that an act or omission before the cut-over time does not constitute an offence against new subsections 114E(1) or 114E(2) of the ITM Act.

**Items 39, 40 and 41** deal with circumstances where the export of goods or departure of a ship or aircraft is delayed beyond the cut-over time. **Item 39** applies to goods that were intended to be exported prior to the cut-over time and were not so exported, but which will now be exported after the cut-over time. **Subitem 39(3)** provides that if a Certificate of Clearance is not given before the cut-over time, then the entries previously made will have to be re-submitted using the ICS. If a Certificate of Clearance has been given before the cut-over time, then the goods will not need to be re-entered. Similarly, **item 40** deals with ships and aircraft whose departure is delayed from before the cut-over time until after that time. If a Certificate of Clearance is given to the master or pilot before the cut-over time, then **subitem 40(3)** provides that the ship or aircraft can depart after the cut-over time without further obligations having to be satisfied. If the Certificate of Clearance is not given before the cut-over time, then the goods on board the ship or aircraft will have to be re-entered using the new system (**subitem 40(4)** refers).

An exception is provided by **item 41** which gives power to the CEO of Customs to determine the continued application of the unamended Customs Act in exceptional circumstances for up to 30 days after the cut-over time. The CEO will only be able to exercise the power to determine if he/she is satisfied that exceptional circumstances, such as bad weather, has delayed, or will delay the export of goods or the departure of a ship or aircraft (**subitem 41(3)**). **Subitem 41(2)** sets out the very limited circumstances in which this exception may apply. According to the *Explanatory Memorandum*[28] it is proposed to limit the circumstances in which this exception will apply so that the goods must have been entered for export, they must have been subject to an authority to deal and they must have been under Customs control (that is, they must have been delivered to a prescribed place for export). If the goods meet all of these criteria and the CEO determines that entries made under the old system can apply, then the goods may be exported without the re-entry of information or the re-making of the relevant manifests and applications using the new system. This exception will only continue to apply for 30 days after the intended day of exportation, that is, the day notified in the entry before the cut-over time.

A note in **subitem 41(3)** indicates that the exception may apply to a class of goods. The *Explanatory Memorandum* gives the example that if bad weather delayed ships entering a port and being loaded, but the goods were at the wharf and ready to be loaded, then the CEO may determine that goods that were not loaded because of such delay would not require re-entry using the new system.[29]

**Commencement**: Royal Assent

## Endnotes

1 Australian Customs Service, *Annual Report* 1997–98, p. 28–29.

2 Riley, James, 'Dockland's data deadline', *Australian*, 2 September 2003, Computer section p. 1.

3 Cooper, Cameron, 'Customs' bid to get services shipshape', *Australian*, 3 April 2003.

4 Senator the Hon Chris Ellison, 'Customs streamline business import/export controls', *Media Release*, E67/01, 9 April 2001.

5 The legislation which supports the policy and technical initiatives for CMR comprises three Acts – *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001; Import Processing Charges Act 2001; Customs Depot Licensing Charges Amendment Act 2001*. All three Acts received Royal Assent in July 2001.

6 This legislation is to commence by proclamation. In June 2002 an amendment was introduced into Parliament to extend the maximum period for proclamation from two years (July 2003) to three years (July 2004). See *Import Processing Charges (Amendment and Repeal) Bill 2002*. The Act received Royal Assent on 8 October 2002.

7 Australian Customs Service, *Annual Report* 2001-02, p. 17.

8 Riley, James, 'Dockland's data deadline', op. cit.; also Connors, Emma, 'Customs faces tech calamity', *Australian Financial Review*, 19 August 2003; Australian Customs Service, *Annual Report* 2001-02, p. 16–18.

9 Connors, Emma, 'Customs faces tech calamity', op. cit.; Australian Customs Service, 'New dates for Cargo Management Re-engineering rollout', *Customs Media Release*, 15 August 2003.

10 Connors, Emma, 'Cost of Customs' software blows out', *Australian Financial Review*, 27 May 2003.

11 Cooper, Cameron, op. cit.; Australian Customs Service, 'New dates for Cargo Management Re-engineering rollout', *Customs Media Release*, 15 August 2003.

12 Connors, Emma, 'Cost of Customs' software blows out', *Australian Financial Review*, 27 May 2003.

13 *Explanatory Memorandum*, p. 13.

14 Hon Daryl Williams MP, 'Second Reading Speech', Customs Legislation Amendment Bill (No. 2) 2003, House of Representatives, *Debates*, p. 14642.

15 ibid., p. 14640.

16 *Explanatory Memorandum*, Customs Legislation Amendment Bill (No. 2) 2003, p. 3.

17 ibid., p. 3.

18 ibid., p. 9.

19 It is expected that these signature requirements would be digital signatures using new public key infrastructure technology, but the provision is designed to be flexible to allow the CEO of Customs to make a determination about the form of verification required. EM, p. 11.

20 *Explanatory Memorandum*, Customs Legislation Amendment Bill (No. 2) 2003, p. 3–4.

21 ibid., p. 4.

22 ibid., p. 14.

23 ibid., p. 15.

24 *Explanatory Memorandum,* p. 19. A similar point is made on p. 20: 'To allow someone to pay the duty and receive the benefit of subsection 243T(4) after an infringement notice has been served or proceedings commence would result in administrative difficulties'.

25 *Explanatory Memorandum,* Customs Legislation Amendment Bill (No. 2) 2003, p. 4.

26 ibid., p. 23.

27 Item 5 of Schedule 2 to the ITM Act repealed section 243U on 1 July 2002.

28 *Explanatory Memorandum*, Customs Legislation Amendment Bill (No. 2) 2003, p. 31.

29 ibid., p. [32].